

THE LEGAL PHILOSOPHY OF ROSCOE POUND

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THE robust spirit of Pound's writings, abounding as they do in good sense and lively understanding of the way in which the legal order functions, has guided and inspired more than one American jurist. Again, the Dean's vast erudition¹ has enabled him to find hidden significance in various aspects and items of legal development. His rare genius for classification has given us broad historical generalizations by which to unify and deal with the minutiae of every period of legal thought. These virtues and values are beyond question. But they are not the peculiar virtues of a philosopher, or at least not those of a philosophy; and it is Pound's philosophy that we propose to examine.

However, as no philosophy exists in complete independence of the extra-philosophic equipment and characteristics of its creator, it will be convenient, in tracing briefly the development in legal and philosophic thought leading to Pound's position, to confuse to a certain extent philosophy and general intellectual attitude. But the confusion will serve merely as a passing device, followed by a more exact consideration of the philosophy in question.

PRECURSORS

When a thinker stands at the very center of the liberal thought of his time and subject, it is next to impossible to point to a limited number of writers as his spiritual parents; rather he absorbs his fundamental ideas along with the intellectual air he breathes. When, into the bargain, the thinker has read almost all the literature in his field and possesses the happy faculty of finding a kernel of truth in every doctrine, the task

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1. He has extended his erudition so far beyond the realm of law proper—e.g., he is an authority on the phytogeography of Nebraska and has essayed a rearrangement of the North American hyphomycetes—that it has become legendary in its inclusiveness. A number of anecdotes have grown up around Dean Pound and his limitless learning. A typical story will indicate the nature of all.

It is said that on a visit to England to deliver a series of lectures on law, Dean Pound attended a banquet in honor of a local celebrity. Engaging in conversation with his neighbor, Pound soon found himself involved in an intricate theological discussion which developed into a heated debate on a difficult question of Church history and doctrine. After a long exchange of arguments, backed on both sides by thorough and learned exemplifications, the Dean's adversary mopped his brow and grudgingly admitted defeat. Looking at Pound with unfeigned curiosity, "by the bye," he said, "I should like very much to know who you are."

"Roscoe Pound, Dean of the Harvard Law School. And who, may I ask, are you?"

"I, sir," replied the worsted adversary, "am only the Archbishop of C——"

is doubly difficult. In choosing three writers as precursors of Pound, I am aware, therefore, of a degree of arbitrariness. We can be certain, at least, that the respective influences of Ihering, Kohler, and James on Pound have gone to the heart of his juristic thought.

The title of Ihering's best known work,² *Der Zweck im Recht*, indicates the jurisprudential revolution that he represents and which he, more than any other single man, brought about. Hitherto, nineteenth-century philosophy of law had inquired primarily into the *nature* of law. Ihering sought also the *end* or *ends* of law. To be sure, the dichotomy is not so simple as it seems. The historical-metaphysical school, which prevailed in Germany at the time when Ihering wrote, attempted to trace the idea of freedom in the history of legal institutions. Ostensibly an inquiry only into the nature of law, is there not a basic ethical undercurrent in that attempt? Was not the idea of freedom both the soul of law and its end? In Ihering, again, in his very teleology, is there no theory of the nature of law? He was not content with the assertion that purpose *ought* to govern the law, he insisted that purpose *does* govern, that all conduct is controlled by purpose.

Technically and in the light of a strict definition of terms, then, the change in this connection was something less than revolutionary. This may be said also of Ihering's innovations in other branches of juristic thought. But it is not quite sufficient to estimate Ihering's work on the sole basis of its precise doctrinal content. In spirit there was a real revolution. Emphasis shifted. From the study of history as an end in itself or as a substantiation of a metaphysical-legal ideal, Ihering turned to an emphasis on more immediate purposes and functions; from the abstract man and his abstract rights, Ihering turned to society, its purposes, and the means necessary to achieve those purposes; from a "jurisprudence of conceptions," he turned to a jurisprudence of actualities and of everyday life. Perhaps most important of all—and here the change was significant also from a doctrinal point of view—he put forward, in opposition to Savigny, a theory of the efficacy of conscious effort in shaping the law. The panic of revolution ended and its innovations turned to commonplaces, Pound represents in a more sophisticated and, shall we say, cautious³ turn of thought the fundamental position for which Ihering stood in the history of legal philosophy.

Historical relativity in the law had been partly explicit and largely implicit in the attitude of Ihering; in Kohler this relativity took form.

2. I.e. best known in the United States. Abroad, *DER KAMPF UMS RECHTS* (translated as *THE STRUGGLE FOR LAW*) is probably more widely read.

3. Perhaps Pound's tendency to avoid detailed treatment of the psychological and economic ramifications of his subject is a result of a lesson learned from Ihering, whose own excursions into related fields were spirited and suggestive but for the most part also naive and superficial.

Kohler looked upon law as a phenomenon of civilization (*Kultur*). Civilization continually changes, and so must law. Principles and rules of law suitable to one stage of civilization may not be suitable to the next. The slightest familiarity with the essays of Dean Pound will show how deep this thought has taken root in his philosophy. A further inquiry into Kohler's doctrine is unnecessary for the present purpose.⁴

From the philosophy of Pragmatism, and especially from that of William James, Pound probably derived as much indirectly as directly. Professor Whitehead says that James founded a new philosophical epoch; and certainly the influence of Pragmatism comes upon one from all sides. In the philosophy of Dean Pound that influence appears in two aspects, one ethical, the other epistemological.⁵

The ethical aspect may be summarized by James' description of the end of ends, "to satisfy at all times as many demands as we can."⁶ Dean Pound accepts this goal and sets it up as the purpose and function of law. In the true pragmatic tradition, he makes of "good works," measured by this end of ends, a criterion by which to judge the doctrines of other thinkers and a goal at which to aim in constructing his own theory.⁷

What I have called the epistemological aspect of Pound's pragmatism rests upon the doctrine of the relativity of thought, according to which every alleged truth propounded by thinking man represents simply an attempt to make an adjustment to the conditions or facts of the time and place and has therefore no claim to universal validity. The proposition that all truth is relative in this way, stands alone, like Heraclitus' Law of Flux, as the single rock in the whirl of change. Pound brings philosophies of law within the pragmatic generalization and shows that each of them is designed ". . . to formulate a general theory of the legal order to meet the needs of some given period of legal development. . . ."⁸

4. Kohler was regarded as the leader of the Neo-Hegelian school in juristic thought. Pound leans toward Hegelism when he repeatedly describes what seems to him the regular or normal course of juristic development. His four stages of normal development are, in chronological order, primitive law, strict law, equity, and maturity. Cf. note 5 *infra*.

5. But cf. COHEN, *LAW AND THE SOCIAL ORDER* (1933) 329: "Dean Pound has himself at times characterized his philosophic position as pragmatic. This is certainly true in the field of ethics, to the extent that pragmatism is a continuation of social utilitarianism represented in law by Ihering. However, as a logician and especially as a legal historian, Dean Pound is decidedly Neo-Hegelian showing markedly the influence of Kohler in emphasizing the ideologic factor." But Pound says of Kohler's interpretation of history: "It is at bottom an idealistic interpretation and I prefer an instrumentalist point of view." POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 150.

6. JAMES, *THE WILL TO BELIEVE*, quoted in POUND, *op. cit.* *supra* note 5, at 157.

7. "The true juristic theory, the true juristic method, is the one that brings forth good works." Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 *HARV. L. REV.* 591, 598.

8. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922) 20.

Thanks at least in part to Ihering's preliminary clearing of the way, Pound sees the end of law as the fundamental problem in legal philosophy.⁹ Like Kohler, he regards law as non-static and as a phenomenon of civilization. And the whole is wrapped in a pragmatic critique and pragmatic ethical theory. The three threads represent a single, broad tendency in modern thought, legal and otherwise, a tendency away from logical abstraction toward "realism" in the current sense of the term.¹⁰ They reveal Pound as a thinker in a direct line of philosophical development.

THE ENGINEERING THEORY

In developing his Engineering Theory of law Dean Pound does not rigidly observe the distinction between expository and censorial (or normative) jurisprudence;¹¹ that is, he does not always distinguish between the philosophical exposition of the nature of law and the philosophical exposition of the end of law. His doctrine sets forth an end of law and is also intended at least in part as an account of what actually takes place in the legal order, although the extent of the ground which it is intended to cover in this respect is not always clear. From a strictly pragmatic point of view a confusion of Is and Ought may sometimes be justified. Pragmatically, it might be little amiss if one treated that as existing which ought to exist; and if, in setting forth as an actuality what was at least a wholesome ideal, one succeeded in furthering the realization of that ideal, Pragmatism would justify the effort and crown the incident doctrine with the laurel of Truth.

The End of Law. At all events, the Engineering Theory is presented primarily and unequivocally as a theory of the end of law and as such we shall first consider it.

James' ethical ideal, "to satisfy at all times as many demands as we can," becomes, as an ideal for the jurist, the "securing of all social interests so far as he may."¹² The end of law is "to do whatever may be achieved thereby to satisfy human desires."¹² "Interests", "desires",

9. Pound also has inherited from Ihering his faith in the efficacy of conscious effort in shaping the law.

10. I.e. they represent in large part a shift in emphasis from the rationalistic to the empirical element in philosophy and science. Ihering and James, of course, went further in this direction than Kohler. Of Kohler perhaps the most we can say is that he tended to recognize the empirical element without abandoning a basic rationalism.

11. The terminology—"expository" and "censorial"—is Bentham's. It is to be the everlasting glory of the analytical jurists that they tried to observe this distinction.

The tendency to confuse the two is simply an aspect of the broader tendency to confuse Is and Ought, a tendency traceable to the Greeks—Plato identified the ultimately real (ideal) and the good, and Aristotle regarded final ends as part of the inherent constitution of things—and represented at the present time notably by the pragmatists.

12. POUND, *op. cit.* *supra* note 8, at 96.

"claims", "wants"—for the most part the words are used interchangeably in Pound's writings, although "interests" sometimes serves as the inclusive term.¹³ There is no hedonism, express or implied, but rather the modified position of the pragmatist and social utilitarian: satisfaction of human "interests", not happiness, is the end of ends. And "interests" are simply what people think their interests to be, that is, that which they desire. Socratically, we might require further analysis. Everyone desires happiness or godliness or some other end or other ends of ends; as means thereto, everyone desires more modest ends or, more properly, desiderata, and as means to those objectives still more modest intermediate desiderata—so we might argue. Where in the scale of means-to-ends do "interests" belong? What, in other words, does Pound mean by "desires" or "interests"? Certainly nothing ultimate, nothing so ideal as happiness or godliness. There is, he says, a social interest in the security of acquisitions, on which our economic order rests, and a social interest in the individual life.¹⁴ Again he speaks of the social interest in "economic progress", in "the general morals", in "the general security", and so forth.¹⁵ An interest, then, is a matter of some generality and need not vary with desire for or against a particular decision in a particular controversy. Will it not be just, according to Pound, to render a decision which satisfies the social interest in security of acquisitions even although society itself, because of its ignorance, disapproves of the decision? The court believes the decision will secure the interest in question, security of acquisitions—is not that enough? I think we must answer, consistently with Pound's treatment of the subject, in the affirmative.

If, then, the Court can justly oppose a specific social interest-desire in favor of a larger social interest-desire, we must have a theory to indicate the propriety of securing interest-desires of one generality or inclusiveness rather than another. Let us say that society—using the term as Pound uses it, in all its sententious vagueness—desires *A*; believing, perhaps falsely, that *B* is a means to *A*, it desires *B*; believing that *C* will lead to *B*, it desires *C*, and so forth, until we come to *Z*, a particular decision in a particular controversy.¹⁶ Bearing in mind Pound's identification of

13. POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 196.

14. *Id.* at 187.

15. POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 160.

16. For *A*, we may substitute "the happiness of all individuals"; for *B*, "the health of all individuals"; for *C*, "the securing for each individual of the food desired by him"; for *D*, "security against the theft of food" (a subcategory of "security of acquisitions"); for *Z*, "imprisonment of a food thief." In particular societies and cases *D* may not be a correct means to *C* (e.g. where all food is the property of a few individuals), and *C* may not be a correct means to *B* (e.g. where we are dealing with gourmands). Much will depend, therefore, on the level of interest that our pragmatic theorist chooses as the starting point of his theory.

"interests", the securing of which is the end of law, with "claims" or "desires" (that is, that which is claimed or desired) we may, consistently with Pound's general theory, say that the end of the law is to secure *B*; or, in a school one degree "nearer earth", we may say that it ought to secure *C*; or *D*, and so forth. If *B* is hit upon as the interest to be secured, and *C*' is really the only means whereby *B* can be secured, a court should not seek to secure *C*, even though some juristic theorists, in the school "nearer earth", might choose *C* as the fundamental interest to be secured. When the theorist chooses any one of the desiderata in the scale, he must justify his choice, not merely by showing that the interest is desired (for all interests in the scale are desired), but by showing that among those things which are desired *it* and none other in the same scale of means-to-ends is the most convenient or expedient point of departure. And this can be done, of course, only by reference to some standard or end outside the scale of desiderata itself. But Pound denies the existence of such a standard.¹⁷ Never was there a more obvious attempt to lift oneself by one's own bootstraps.

Is the difficulty not resolved, it may be asked, by the requisite that one satisfy "all social interest so far as he may"?¹⁸ If society desires *A*, and therefore desires means *B*, sub-means *C*, and so forth, let us satisfy as many of those desires as possible. But only chaos could conceivably result from the application of such a theory; and it is probably unfair to suppose that Pound had in mind the satisfaction of various desires on a single scale of means-to-ends.¹⁹ What he meant was, in all probability, all of *competing, independent* interest, *i.e.*, *A*, *A'*, *A''* . . . or *B*, *B'*, *B''* . . . (Even so, we must have a reason for dealing with one level of interests rather than another). The jurist is to maintain so far as possible "a balance or harmony among them that is compatible with the securing of all of them."²⁰

What is the jurist to do when he finds himself faced with competing interests? He must, we should say, try to evaluate them, measure the good or harm which every possible decision would work with respect to each of the interests, and decide the controversy in accordance with the result of this evaluation and measurement. How will he go about the task of evaluation? Let us examine Dean Pound's answer:

"Philosophers have devoted much ingenuity to the discovery of some method

17. POUND, *op. cit.* *supra* note 8, at 96.

18. *Ibid.* (italics ours).

19. The interests mentioned by Pound sometimes have, however, a means-to-ends relation. For example, "the general security" (public safety) is a means to "security of acquisitions" and to security of "the individual life." *Supra*, p. 6. What if a temporary refusal to secure the interest in "the general security" is necessary to the security of "the individual life," as perhaps in the case of a violent labor strike which is the only means of providing a large number of workmen with a living wage?

20. POUND, *op. cit.* *supra* note 8, at 96.

of getting at the intrinsic importance of various interests, so that an absolute formula may be reached in accordance wherewith it may be assured that the weightier interests intrinsically shall prevail. But I am skeptical as to the possibility of an absolute judgment. We are confronted at this point by a fundamental question of social and political philosophy. I do not believe the jurist has to do more than recognize the problem . . .

"Social utilitarians would say, weigh the several interests in terms of the end of law. But have we any given to us absolutely? Is the end of law anything less than to do whatever may be achieved thereby to satisfy human desires?"²¹

And so we are back where we started and have derived no criterion to help the jurist who seeks the just solution of a controversy in which he is obliged to choose between conflicting interests.

Pound continues: "Are the limits any other than those imposed by the tools [i.e., legal machinery] with which we work . . .?"²² The answer is that they are, indeed. The limits are in part purely logical. Plaintiff demands *X*, and half of society demands the same; defendant, with the other half on his side, demands *not-X*. Sharpen your tools as you may, you cannot fully secure both *X* and *not-X*. What is needed to resolve the controversy in accordance with justice, is a theory and a process by which we can ascertain whether the securing of *X* is more valuable to society than the securing of *not-X*, and how much and in what way a decision of the particular controversy for either party will affect each of the interests involved. If the social and political philosopher alone can provide such a theory and such a process, jurist must turn philosopher or must leave his problem unsolved.

Dean Pound's pragmatic theory of the end of law, then, leaves us with the essential problem "on our laps." Philosophically it is little more than a vague suggestion of the general direction of inquiry; and we may properly criticize it on philosophical grounds because it deals with a problem of philosophy—the end of law—and proposes a solution.

The Nature of the Legal Order. Pound's theory of the nature of law or, as he sometimes prefers to say, of the legal order, is not independent of his theory of the end of law. In fact, he defines the legal order by reference to the end of law:

"It [the legal order] may well be thought of as a task or as a great series of tasks of social engineering; as an elimination of friction and precluding of waste, so far as possible, in the satisfaction of infinite human desires out of a relatively finite store of the material goods of existence."²³

Again:

"For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may

21. *Id.* at 95-96.

22. *Id.* at 96.

23. POUND, *op. cit. supra* note 15, at 156.

with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.”²⁴

We may pause here to remark the beauty of the analogy to engineering. Like the engineer, the jurist constructs, creates—but not out of thin air. Like the engineer, he must work with resistive materials, without which, however, he could not build at all; and always there are adverse conditions imposed upon his activity. Friction and waste, represented by a sacrifice of interests which might be secured, must be overcome. The task is one for human activity: though requiring methodical care, there is nevertheless nothing static about it. Technique and materials may be improved. Jurist must work on, must create an ever greater, ever more serviceable structure. The engineering analogy stands out as both graphic and timely.²⁵

To return to the definitions quoted—the philosophically-minded reader will have perceived a joker. The legal order “may well be thought of”, “For the purpose of understanding the law of today”, “For present purposes”, in all this there rings the note of a basically pragmatic theory. Apparently Pound’s definitions are intended not to tell us the nature of the thing defined but to help satisfy our present-day “interests.” Not that the legal order *is*, in any purely objective sense, a social engineering, but it would be “well” to think of it as such. We are in the realm of fiction; or rather of half-truth, for no one will deny that the attempt to provide a “more embracing and effective securing of social interests” has played a large part in the development of the law.

Dean Pound understands legal history far too well to be altogether deceived by his own pragmatic half-truth. Observe how the pragmatist’s pluralistic attitude, with its attendant open-mindedness and good sense, saves him from the vice of his technical pragmatism. In one of the most brilliant of Pound’s historical-critical essays,²⁶ he deals with each of the

24. POUND, *op. cit. supra* note 8, at 98-99.

25. The analogy is adopted in Douglas, *Some Functional Aspects of Bankruptcy* (1932) 41 YALE L. J. 329, 331.

Vinogradoff, in rejecting the analogy, does not seem to grasp its meaning. *Aims and Methods of Jurisprudence* (1924) 24 COL. L. REV. 1, 5.

26. POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923).

interpretations of legal history which jurists have at one time or another advanced, and finds in every interpretation a modicum of truth. In part the truth which he finds there is pragmatic. That is, it involves the demonstrable *value* of the interpretation with respect to past and present-day needs, apart from its merit as a mirror of actual phenomena. The now widely urged economic interpretation, for example, "has been a stimulus to faith in the efficacy of effort, even if its adherents thought juristic effort futile",²⁷ and it leads jurists to a proper conception of the end of law, "a legal ordering of the satisfaction of wants out of the limited material goods of existence."²⁸ All this is purely pragmatic criticism. It is altogether compatible with the validity of the Engineering Theory, for it finds other theories or interpretations valid only in those respects in which they accord with that theory. In so far as an interpretation sounds out of key with the Engineering Theory it is invalid. So Pound refuses to accept all of Kohler's theory because, unlike the engineering interpretation, it treats of causes rather than instruments.²⁹ A non-pragmatic scientific investigator trying to understand his data would ordinarily prefer to deal with causes.

But together with the pragmatic criticism, sometimes clearly separated from it and at other times inextricably blended with it, Pound gives us a clear-sighted criticism based on orthodox correspondence-to-phenomena standards of truth and related to the question of value only in so far as all criticism based on truth in the objective, non-pragmatic sense may be said to be related thereto. The economic interpretation not only leads in practice to faith in the efficacy of effort and other desirable results, but it also tells to a certain extent what actually occurs:

"One cannot examine nineteenth-century legislation without perceiving that organized pressure from groups having a common economic interest is the sole explanation of many things upon the statute book. . . . The remarks of Mr. Justice Darling about legislation intended to relieve the members of certain organizations from the 'humiliating position' of being upon an equality with the rest of the king's subjects might be applied to more than one American statute."³⁰

Sometimes, then, the law turns away from its effort to reconcile all interests and deliberately favors "the members of certain organizations." At such times the engineering interpretation is simply untrue and only the economic interpretation can explain the facts. Such instances may be infrequent, but if we are to interpret legal history, if we are to find a theory to account for the phenomena that come within that history, we must follow the lead of the scientist in every other field and cut our ideal cloth to fit the nastiest and tiniest fact. Needless to add, the infrequency

27. *Id.* at 115.29. *Id.* at 150-151.28. *Id.* at 114.30. *Id.* at 113-114.

of legislative and judicial leaning toward the interest of a dominant class is open to question.³¹

The Engineering Theory, then, as an account of what actually occurs, admits of exceptions. In reality, as Pound himself insists, a number of causes contribute to the making of law. Pound is in this respect fundamentally pluralistic. But his pluralism does not altogether emasculate the Engineering Theory, for in a broad sense the Engineering Theory is not monistic. In addition to legislators and judges trying to reconcile and to secure social interests, there are obstacles to be overcome, and those obstacles, which in their way contribute to the formation of the legal order, are accounted for in the theory. The subconscious and conscious prejudices³² of legislators and judges, which our psychological jurists have dwelt upon with a sense of discovery not altogether justifiable, are subsumed under the theory as part and parcel of the obstacles which the engineer-jurist must overcome. Juristic activity is "conditioned by the capacities, the characters and the prejudices of those who plan and make, by the materials with which they must work, by the circumstances in which they must work, and by the special purposes for which they work."³³ We must try to do away with "the unconscious warping."³⁴

The value of the Engineering Theory as an account of what actually occurs, then, is greater than we, as juristic pluralists, might have expected. For it contains within itself a dualism of conscious social endeavor and conditioning obstacles; and, by subsuming within the latter part of the dualism everything with which the socially-minded judge must contend, it accounts for a vast number of the causes which shape the legal order. Only when the lawmaker or judge turns consciously anti-social or asocial does the theory miss the mark; and we must await a really scientific investigation of the frequency and effect of such turnings before we can estimate the extent of the deficiency. At all events, it is clear that the deficiency exists and that the Engineering Theory does not account for the whole of the legal order.

It is hard to tell whether Pound expressly recognizes the deficiency. Some passages may be construed as recognitions thereof. For example:

"It would be vain to pretend that adjudication and law-making are in fact determined wholly by a scientific balancing of interests and an endeavor to reconcile them so as to secure the most with the least sacrifice. The pressure

31. Cf. International Juridical Association Monthly Bulletin, any issue.

32. "Nor may we blind ourselves to the part which the origin, education and every-day associations of the judges have played in the interpretation of laws relating to groups with whose interests they were but imperfectly acquainted, whose aspirations were known to them only in an abstract sense, and whose modes of thought were looked at through the medium of another order of ideas." POUND, *INTERPRETATION OF LEGAL HISTORY* (1923) 114.

33. *Id.* at 152.

34. *Id.* at 157.

of claims or demands or desires, as well as many things that the social psychologist is teaching us to look into, will warp the actual compromises of the legal order to a greater or less extent."³⁴

If "the pressure of claims" and the "many things" do their warping by adversely affecting the judgment of law-maker and judge, they simply belong among the conditions that affect juristic activity; and the Engineering Theory remains undisturbed. If, on the other hand, Pound means that law-makers and judges sometimes consciously abandon their effort at social engineering, the theory must fall back on Pragmatism alone for its validity. I believe that the conclusion of the passage suggests the former meaning:

"But we get no peace, as it were, until we secure as much as we can and the pressure of the unsecured interest or unsatisfied demand keeps us at work trying to find the more inclusive solution. We may not expect to draw any picture of the legal order to which the actual ordering of human relations will give exact effect. There will be less of the unconscious warping, however, the more clearly we picture what we are seeking to do and to what end, and the more we are aware that the legal order is a process of adjustment of overlapping claims and compromising conflicting demands or desires in the endeavor here and now to give effect to as much as we can. In other words, our social engineering will be the more effective the more clearly we recognize what we are doing and why."³⁴

What the jurist must do, according to this passage, is simply to recognize as clearly as possible that he is a social engineer; and we may therefore conclude that he is all the while assumed to be such an engineer. No account is here taken of the effect upon the legal order of the lawmaker and judge who simply do not strive to secure as many social interests as they can.

It may be questioned whether in view of the omission the engineering interpretation, as a theory of the legal order, really serves its pragmatic function. We must not blind ourselves to the activities of the legislator or judge whose aims are other than social engineering. To make the Engineering Theory of the legal order consistent with the existence of that individual, we shall have to modify it by adding that the jurist is a social engineer *only so long as he remains true to his function*; but once we have said that, we must define his function and we find ourselves back in the field of the end of law. The merits of the Engineering Theory as a philosophy of the end of law have already been discussed.

THE RELATIVITY OF PHILOSOPHIES OF LAW

The traditional Anglo-American distrust of pure reason and metaphysical doctrine, permeates Pragmatism and through Pragmatism crops up in the legal philosophy of Dean Pound. There it takes the form of a theory of the relativity of ostensibly abstract juristic thought. According to that theory every philosophy of law has depended upon and an-

swered to the special needs of a given time and place. In Pound's words:

"... philosophies of law have been attempts to give a rational account of the law of the time and place, or attempts to formulate a general theory of the legal order to meet the needs of some given period of legal development, or attempts to state the results of the two former attempts universally and to make them all-sufficient for law everywhere and for all time."³⁵

Here explicit, this theory is implied in several of Pound's essays. The universality at which the third attempt aims, does not weaken the theory; for there legal philosophy simply states "the results of the two former attempts" and those attempts were definitely tied down in each case to the exigencies of a time and place.

I can give here only a superficial suggestion of the learned history of legal thought with which Pound exemplifies his theory. Aristotle's distinction between the Just by nature and the Just by convention or enactment, satisfies the Greek need "to maintain the general security and the security of social institutions amid a strife of factions in a society organized on the basis of kinship and against the wilfulness of masterful individuals boasting descent from gods."³⁶ Again, the distinction was adopted by Roman jurists because it fitted neatly their contrast between legislation and the writings of the jurisconsults. Scholastic legal philosophy served the crying need for peace and order after a period of anarchy and violence. The Protestant jurist-theologians, with their divinely ordained state and natural law based on reason, satisfied the need for national law in a civilization in which the rise of nations was following the collapse of feudalism. The period of growth in the seventeenth and eighteenth centuries called for a theory of natural rights secured by natural law, and such a theory therefore came into existence. The subsequent need to digest and systematize that which had come into law during the period of growth and to maintain the security of transactions in an age of business expansion, gave rise to the various legal philosophies of the nineteenth century which regarded law as unaffected by conscious human endeavor and as static or derived historically by a fixed and eternally immutable process. Every reflective age of legal development has its appropriate philosophy of law and every philosophy of law answers the needs of a given time and place.³⁷

As a backbone on which to build a history of legal thought Pound's doctrine of relativity has proved itself invaluable. Together with the closely packed substance of Pound's legal erudition, it gives us a comprehensive and manageable history which without such a backbone would

35. POUND, *op. cit. supra* note 8, at 20.

36. *Id.* at 24.

37. Pound is, to his great credit, not so ingenuous as to suppose that his own Engineering Theory constitutes a lone exception to the rule of relativity. He proffers it consciously as a theory intended to satisfy the needs of present-day society. POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 195-196.

be in constant danger of relapse into a chaotic mass of assorted details. By and large, the theory accounts nicely for the facts.

At the very beginning, however, it strikes a real snag in the philosophy of Aristotle. The distinction between the Just by nature and the Just by convention is at bottom a distinction between the Just "which has everywhere the same force"³⁸ and the Just which depends upon local conditions. Now, in itself this basic classification contains no substance, no color: it deals only with the formal nature of law or justice, which it finds to contain a rational, universal element and an empirical element. It is difficult to see how this bare fundamental of a philosophy of law or justice, emphasizing neither of the two elements in law at the sacrifice of the other, can depend on the peculiar needs or interests of Greek society. Aristotle gives us here a valid starting point for any science of just law or justice.³⁹ The substance with which this bare form is clothed may reflect the needs of a given time and place, but we may safely grant independence to the form itself. "The distinction," Pound concedes, "was handed down to modern legal science by Thomas Aquinas, was embodied in Anglo-American legal thought by Blackstone, and has become staple."⁴⁰ Its survival through periods of widely divergent civilizations and legal orders, suggests its universality. Aristotle's identification of the non-universal element in justice with enacted law or legislation betrays a confusion of justice and positive law and is not necessary to the basic distinction.

A twentieth-century jurist whose approach to the philosophy of law contains, like Aristotle's, a purely formal element, and to whom Pound in his discussions of the relativity of legal thought devotes very little space, is Rudolf Stammler. His "natural law with variable content"⁴¹ formula merely elaborates the Aristotelian distinction. Natural law is the permanent element; but changed societies require changed rules of law. The formula really gives us no rules. It is purely formal; and it is submitted that its validity does not depend on the exigencies of a particular civilization. The actual principles of natural law⁴² formulated in the Kantian tradition by Stammler and inserted into the Aristotelian

38. 7 ARISTOTLE, NICOMACHEAN ETHICS 53.

39. Professors Michael and Adler have recently outlined the requisites of a science of law by simply expanding and developing the Aristotelian distinction. MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE (1933) cc. IV, X.

40. POUND, op. cit. *supra* note 8, at 25-26.

41. DIE WIRTSCHAFT UND DAS RECHT (1896) § 33.

42. In the meaning of "formal" which makes it synonymous with "rational" as contrasted with "empirical," these principles are "formal." But the formal element in legal philosophy which I mean to salvage from the whirlpool of relativity is formal in the more restricted sense, i.e. contrasted with "substantial." The Stammlerian principles of just law are substantial, although not empirical.

framework, may, conceivably, come within the theory of relativity (although even that is doubtful), but the assertion that there are such principles can hardly be regarded as merely a rationalization of the law or social needs of a time and place.

As an instrument among instruments, perhaps more potent than the others, the theory of the relativity of legal philosophy may help us to understand the history of legal thought. Its claim to universal validity need not, however, be seriously entertained.

CONCLUSION

Primarily, Dean Pound is an historian and critic of juristic thought. Now a mere historian—a recorder or narrator of facts—may well dispense with the ornament of philosophy. But valid criticism requires a sound philosophic basis; for criticism implies standards, and standards have no significance and hang unsupported in mid-air unless they can be related to an ultimate framework of first principles. In so far as Pound's philosophy is vague and incomplete, therefore, his criticism will be uncertain in meaning and limited in scope.

However, Pound has gone further than many critics of juristic thought; he has at least recognized the existence of the philosophic problem and made some effort to cope with it. And this effort, together with the Dean's erudition, open-mindedness, and realistic functional approach, lends sufficient weight to his criticism for the satisfaction of the intelligent jurist who does not thirst overmuch for doctrinal clarity and precision of thought.